IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

EMPLOYERS MUTUAL CASUALTY COMPANY (also d/b/a EMC INSURANCE COMPANIES),	)	NO. 4:02-cv-30467
Plaintiff,	)	SUPPLEMENT TO RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
COLLINS & AIKMAN FLOOR COVERINGS, INC.,	)	
Defendant.	)	

In the February 13, 2004 Ruling ("February 13 Ruling") on defendant's motion for summary judgment, the Court concluded it was not necessary at this point to address C&A's argument that its standard warranty, with its disclaimer and limitation of remedies provisions, were incorporated by reference in the contract for the sale of the carpet. While that may be the case, on further reflection the Court does not believe that avoidance of the issue gives fair consideration to C&A's arguments, and it would be helpful to the parties for the Court to address the issue prior to trial, which this supplemental ruling is intended to do.

The acknowledgment form discussed at length in the February 13 Ruling states in part as follows on the front:

> . . . Selected C&A floor covering products carry limited warranties against one or more of the following conditions: (a) excessive surface wear, (b) delamination, (c) edge ravel, or (d) color fastness to light and atmospheric contaminants. Warranties applicable are effective from date of installation. For specific warranty details applicable to a particular product, contact

> Collins & Aikman, P.O. Box 1447, Dalton, Georgia, 30722-1447, or our dealer.

C&A contends this language incorporates the terms of its standard warranty. One of these, in capitalized writing, states

> THIS LIMITED WARRANTY AND ANY OTHER LIMITED WARRANTIES ISSUED BY C&A FLOOR COVERINGS FOR THESE PRODUCTS ARE IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

(Def. App. at 214). The warranty also limits C&A's liability "to the actual repair or replacement of the affected area and does not cover incidental or consequential damages." (Id.)

A copy of the standard warranty was not provided to EMC until July 2001. C&A argues that by reason of the statement on the acknowledgment form concerning the warranty, as well as the numerous product specifications sheets it sent to architect BBS prior to acceptance of its bid which included reference to the warranty,[1] EMC should be charged with knowledge of the content of the standard warranty it could, in the exercise of due diligence, have discovered.

[1] The product specification sheets contain a brief description of the warranties offered and refer the reader to the warranty for details. Though EMC had these through its agent BBS, the warranties were not incorporated in the Project Manual. Accordingly, the incorporation by reference argument properly focuses on the acknowledgment form.

There is not a great deal of case law in Iowa on the doctrine of incorporation. However, recently the Iowa Supreme Court has given the broad outlines.[2]

> Under the doctrine of incorporation, one document becomes part of another separate document simply by reference as if the former is fully set out in the latter. 4 Richard A. Lord, Williston on Contracts § 628 (3d ed. 1961). Where a writing refers to another document, that other document, or so much of it as is referred to, is to be interpreted as part of the writing. Id. Whether material is incorporated by reference presents a question of law. 11 Richard A. Lord, Williston on Contracts § 30:25 (4th ed. 1999). We have held clear and specific reference is required to incorporate an extrinsic document by reference. Estate of Kokjohn v. Harrington, 531 N.W.2d 99, 101 (Iowa 1995).

Hofmeyer v. Iowa Dist. Court, 640 N.W.2d 225, 228-29 (Iowa 2001). In view of the Supreme Court's reliance on Williston, it is appropriate to point out the treatise also states that "in order to uphold the validity of terms incorporated by reference, it must be clear that the parties to the agreement had knowledge of and assented to the incorporated terms. . . ." Richard A. Lord, Williston on Contracts, § 30:25 (4th ed. 1999).

Though a final determination of the legal issue will be made at trial, the Court is not presently convinced that the

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[2] The acknowledgment states that its validity and interpretation is to be governed by New York law but the parties have not cited the Court to any relevant New York law. The Court thus assumes the relevant New York law is not materially different from that of Iowa.

acknowledgment form incorporates the entire standard warranty applicable to the carpet in question. First, there is no explicit incorporation language. This is not necessarily fatal to the incorporation claim, but mere mention that C&A warrants certain of its products is not sufficient. Viewed in context, the reference must clearly reflect that the parties have agreed to incorporate the warranties "as if [the warranties] are fully set out" in the acknowledgment. Hofmeyer, 640 N.W.2d at 228-29. The acknowledgment does not incorporate any specific document, but rather states that "[s]elected C&A floor covering products" carry warranties against the conditions described. In effect, the acknowledgment says no more than that a warranty may come with the carpet and tells the buyer where to get details. That is not sufficient to signal that the parties agreed the terms of the warranties were incorporated in their agreement.

Second, the only part of any standard warranty referred to in the acknowledgment is that describing the conditions warranted against. No mention is made of the disclaimers and limitation of remedies in the warranty.

Third, taken altogether, the language in the acknowledgment is at least ambiguous, and arguably inconsistent with an intent that the disclaimer and limitation of remedy provisions in the various warranties be incorporated. The acknowledgment purports to "constitute the entire contract between

Buyer and Seller." Under the heading "**IMPORTANT**" (emphasis original) the acknowledgment states on its face that it is subject to the terms and conditions on both sides of the form, including in bold letters, "**the exclusion of warranties**" provision on the reverse side. That provision is ¶ 6 under the heading "Sales Contract Terms." In similar but different language than in the standard warranty disclaimer, it excludes express and implied warranties and states there are no "warranties or conditions" except those "specifically contained" in the acknowledgment. Paragraph 7 of the terms includes a remedies limitation provision quite different than that in the warranties.

The inclusion of an express provision on a subject in the acknowledgment is against an intent to incorporate a different provision in another document on the same subject, particularly when accompanied by language purporting to limit the parties' agreement to the four corners of the acknowledgment.

As discussed in the February 13 Ruling, whether and the extent to which the acknowledgment form constitutes the agreement of the parties with respect to the sale of the carpet is in dispute. However, if it is given contractual effect it is not clear that the parties thereby agreed to incorporate the additional disclaimer and limitation of remedies provisions in the standard warranty pertaining to the carpet.

The motion for summary judgment on the basis of the doctrine of incorporation is also **denied.**

IT IS SO ORDERED.

Dated this 19th day of February, 2004.

ROSS A. WALTERS
CHIEF UNITED STATES MAGISTRATE JUDGE